

Ad Hoc Access: The Regulation of Editorial Advertising on Television and Radio

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The Fairness Doctrine¹—and broadcasters' obligation to present both sides of controversial public issues—died last August in a Federal Communications Commission (FCC) hearing room.² Congress' attempts to prolong the Doctrine's life had been halted at the President's desk just six weeks before.³ The repeal of the Fairness Doctrine has meant more than an end to a system of regulation that broadcasters claimed was onerous; it has caused a reversal of the "unusual order of First Amendment values"⁴ in broadcasting, under which the right of viewers and listeners to be informed is paramount to the right of station owners to determine what shall be broadcast. This Current Topic argues that the Doctrine's demise should also mean new life for the previously discarded concept of broadcast access, at least for editorial advertisements.⁵

The current treatment of editorial advertisements illustrates well the new balance that has been struck between broadcasters' interests in controlling content and the public's need for information. Broadcast licensees are free to accept or reject whichever editorial advertisements they choose. In the absence of the Fairness Doctrine's requirement of roughly balanced treatment of controversial issues, stations can run these spots as often as their sponsors can afford and give the viewpoints expressed in them as much additional coverage in regular programming as the broadcasters see fit. Oppo-

1. The Fairness Doctrine was formulated under the Federal Communications Commission's power to issue regulations consistent with the "public interest." The doctrine imposes two affirmative responsibilities on broadcasters: coverage of issues of public importance must be adequate and must fairly reflect differing viewpoints. Under the complementary Cullman Doctrine, *Cullman Broadcasting Co.*, 25 Rad. Reg. (P & F) 895 (1963), contrasting views must be presented at the broadcaster's expense if sponsorship is unavailable. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 377 (1969).

2. *Syracuse Peace Council v. Television Station WTVH Syracuse, New York*, FCC 87-266 (rel. Aug. 6, 1987) (Memorandum Opinion and Order).

3. S. 742 would have codified the Fairness Doctrine. Veto of the Fairness in Broadcasting Act of 1987, Message to the Senate Returning S. 742 Without Approval, June 19, 1987. 23 Weekly Comp. Pres. Doc. 715 (June 29, 1987).

4. *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 101 (1973).

5. Throughout this Current Topic the terms advocacy, editorial, and issue advertisements or ads are used interchangeably to refer to advertisements concerning public or political issues, excluding those for or against the election of particular candidates.

nents of the opinions that are expressed, who may have neither the resources to buy time for counter-advertisements nor the clout to get such ads accepted by station owners, no longer have the right protected by the Fairness Doctrine to require a station to give airtime to their points of view. A broadcast licensee also can refuse to run editorial advertisements altogether and confine itself to noncontroversial coverage of news and political issues.

This Current Topic recommends an alternative approach to the regulation of editorial advertising on television and radio, one that places the right of the public to be informed on an equal footing with the right of broadcasters to determine the content of their speech. Implemented through a statutory requirement that stations accept a predetermined amount of such advertising at affordable rates, this proposal would maximize the amount of political information provided to the public while minimizing intrusion into the editorial discretion of licensees. Such a limited right of access, provided for political ideas rather than for individual speakers, is consistent with previous Supreme Court decisions, recent congressional determinations, and long-held constitutional ideals. Shifting the right of access from the speaker's right to use the medium to the public's right to be informed would restore the order of first amendment values in broadcasting to that previously established by Congress and the courts.

The concept of broadcast access is not a new one. In the late 1960s and early 1970s, legal commentators argued that groups and individuals should have the right to purchase airtime to "advertise" their views on television and radio.⁶ The Democratic National Committee and a group called Business Executives' Move for Vietnam Peace pursued this theory of a right of access for individuals as far as the Supreme Court, after various broadcast licensees and networks refused to sell them commercial time. The Court, however, upheld broadcasters' right to reject such ads in *CBS v. DNC*.⁷ The Court

6. The most influential of these arguments appeared in Barron, Access to the Press: A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967).

7. In *CBS v. DNC*, the Democratic National Committee requested a declaratory ruling from the FCC that the Communications Act of 1973 and the first amendment precluded a broadcast licensee from refusing to sell time to "responsible entities" to present their views on public issues. Business Executives' Move for Vietnam Peace filed an FCC complaint alleging that a particular broadcaster had violated the first amendment by refusing to sell it spots to air its views on the Vietnam War. The FCC ruled that a broadcaster was not prohibited from having a policy refusing to accept paid issue ads from individuals and organizations. The Court of Appeals reversed the FCC, finding that where other sorts of paid advertisements are accepted, a flat ban on paid public issue advertisements violated the first amendment. The cases were remanded to the

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reasoned that the editorial discretion accorded broadcasters in the regulatory scheme established by Congress in the Communications Act of 1934⁸ and administered by the FCC through the Fairness Doctrine justified networks and licensees in totally banning such advocacy ads from the air.

During the 15 years since *CBS v. DNC*, however, shortcomings in the system of broadcaster-determined access for issue advertising have been evident.⁹ Groups and individuals have been able to buy time from some independent stations and network affiliates but not others; some ads on public issues have been accepted by the networks while others have been refused. The prospects for editorial ad access under the current regulatory regime are no better. In the absence of the Fairness Doctrine obligation to present a range of viewpoints, licensees have little reason to do so of their own initiative and considerable incentive not to do so.¹⁰ The viewpoint access that is made available will probably be only for the affluent.¹¹

Yet, exposure to a wide spectrum of political ideas is integral to political decisionmaking in a democracy. As the Supreme Court has observed, the first amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."¹² Reaching 98% of the households in the United States,¹³ the broadcast media play a singular role in conveying political ideas. Congress has recognized this unique role in the Communications Act requirement that licensees serve "the public convenience, interest, and necessity."¹⁴ Section 312(a)(7), which mandates that "reasonable access" to the airwaves be provided to federal candidates,¹⁵ further demon-

FCC to develop regulations governing which editorial ads would be aired and in what numbers. The Supreme Court overruled the Court of Appeals, and held that neither the Communications Act nor the first amendment required broadcasters to accept paid editorial advertisements. 412 U.S. 94.

8. 47 U.S.C. §§ 151 *et seq.* (1986).

9. See *infra* text accompanying notes 111-13.

10. See *infra* text accompanying notes 114-19.

11. See Sethi, *Beyond the Fairness Doctrine: A New War on Corporate "Propaganda,"* N.Y. Times, Aug. 10, 1986, § 3, at 3.

12. *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

13. U.S. Bur. of the Census, *Statistical Abstract, Census of Housing* 531 (1987) (1986 figure).

14. This statutory standard covering the grant and renewal of licenses is commonly known as the "public interest standard." 47 U.S.C. § 307(a) (1982).

15. Congress specifically expanded the political broadcasting responsibilities of licensees in 1972 when it passed the Federal Elections Campaign Act (Pub. L. No. 92-225, 86 Stat. 3 (1972)), which amended the Communications Act to require broadcasters to sell, or provide free, reasonable amounts of time to federal candidates in order to "give candidates for public office greater access to the media so that they may better

strates Congress' awareness of the media's function in a representative democracy. A principled basis for upholding a limited right of access for candidates' advertising, which the Court did in *CBS v. FCC*,¹⁶ while denying a limited right of access for political issue advertisements is difficult to discern.

The editorial ad statute proposed in this Current Topic¹⁷ is modeled on the provisions of the Communications Act that provide reasonable access¹⁸ and low ad rates¹⁹ for candidates for political office.²⁰ Like the candidate access provisions, the proposed editorial advertising scheme requires a negligible amount of government interference with broadcasters' and political advertisers' speech. The statute is premised on the assumption that the expression of more political viewpoints through the broadcast media is a good thing in and of itself. Thus, it does not require that the identity of the speakers or the content of their messages be controlled, except to the extent necessary to ensure that the greatest number of voices are heard. Nor will broadcasters' speech be monitored; their only obligation will be to regulate the frequency with which ads appear, a

explain their stand on the issues, and thereby more fully and completely inform the voters." S. Rep. No. 92-96, 20 (1971) (Report of the Senate Commerce Committee) *cited in* Columbia Broadcasting Sys. v. FCC, 453 U.S. 367, 379 (1981).

16. 453 U.S. 367 (1981).

17. Statutory regimes for editorial advertising access have been discussed by previous commentators. The statutes considered had different parameters than the one proposed below; it was presumed that they would work in tandem with the now-moribund Fairness Doctrine, and the conclusions drawn about their likely success differed from those advanced here. See Maeder, Right of Access to the Broadcast Media for Paid Editorial Advertising—A Plea to Congress, 22 U.C.L.A. L. Rev. 258 (1974); Lee, The Problems of "Reasonable Access" to Broadcasting for Noncommercial Expression: Content Discrimination, Appellate Review, and Separation of Commercial and Noncommercial Expression, 34 U. Fla. L. Rev. 348 (1982).

18. The Communications Act authorizes the Commission to revoke a broadcaster's license "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." 47 U.S.C. § 312(a)(7) (1986).

19. Section 315(b)(1) provides that during a specified period before a primary or general election, a broadcast station is not permitted to charge a legally qualified candidate for any public office a fee in excess of its lowest unit charge for the same class and amount of time for the same period. 47 U.S.C. § 315(b)(1) (1986).

20. An access proposal for noncommercial expression based on the reasonable access rules was criticized in Lee, *supra* note 17. The author concluded that it would be unconstitutional for the government to advance only political speech or political speakers on the airwaves. This conclusion runs contrary to the Supreme Court's holding that a congressionally mandated right of access to the broadcast media for federal candidates was permissible in *CBS v. FCC*, and its subsequent limited public forum holdings in *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 948 (1983) (a school district may restrict access to teachers' mail boxes to a single bargaining representative) and *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985) (federal charity drive may exclude general category of political advocacy and legal defense groups).

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task for which stations and networks are well equipped.²¹ As a result, this statute would meet the twin goals articulated by Congress and the Court. It would provide the public additional access to political ideas²² while maintaining a maximum measure of journalistic independence for broadcasters.²³

I. The History of Broadcast Access in the Courts

The Supreme Court's rulings on access to the broadcast media reflect a continuing concern with the difficulty of balancing individual and collective first amendment values. As a result, various values appear to take precedence from case to case. For example, in *Red Lion*,²⁴ the Court's first consideration of broadcast access, the right asserted was for individuals personally attacked on the air and for the opponents of candidates endorsed in broadcast editorials. The Court underscored both the public's right "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences,"²⁵ and the obligation of the licensee to present "views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves."²⁶ Four years later, however, when the Court in *CBS v. DNC* considered a more generalized right of access for individuals wishing to express political views, it placed primary importance on the rights of broadcasters and on congressional intent, evinced in the Communications Act, "to permit private broadcasting to develop with the widest jour-

21. Licensees and networks already schedule thousands of commercial messages annually and review them for content, which this statute would not require. In addition, under § 315 of the Communications Act, licensees are required to provide equal opportunities to all candidates for a public office once the station has permitted one such candidate to buy time or appear on a non-exempted program. The political broadcasting statute "operates with a type of mathematical certainty not usually found in broadcast regulation." H. Zuckman & M. Gaynes, *Mass Communications Law* 389 (2d ed. 1983).

22. *Red Lion*, 395 U.S. at 390.

23. *CBS v. DNC*, 412 U.S. at 110.

24. 395 U.S. 367. In *Red Lion*, the Court upheld the FCC's Fairness Doctrine, as well as FCC-mandated rights of access for individuals attacked on the air or candidates opposed in station editorials. Justice White's opinion for a unanimous Court found that a limited right of access would "enhance rather than abridge the freedoms of speech and press." 395 U.S. at 375. He emphasized the "scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without government assistance to gain access to those frequencies for expression of their views." 395 U.S. at 400. In response to broadcasters' first amendment arguments, Justice White stressed the speech interests of the public and noted that dissimilarities in the characteristics of different media justified the application of varying first amendment standards. 395 U.S. at 386.

25. 395 U.S. at 390.

26. 395 U.S. at 389.

nalistic freedom consistent with its public obligations.”²⁷ Then, in 1981, the Court again emphasized the public’s right to be informed by holding that a limited access requirement for federal candidates did not unduly circumscribe the editorial discretion of broadcast licensees. In that case, *CBS v. FCC*,²⁸ the Court rejected the argument that the delicate balance between competing first amendment interests, described in *CBS v. DNC*, was disrupted by recognition of a limited right of access. The Court reiterated the *Red Lion* argument that the government could require a licensee to share his or her frequency with others without running afoul of the first amendment.²⁹

In *CBS v. DNC* the Court put forth a number of specific arguments against a first-come, first-served access scheme for issue advertisements. Objections included: (1) the danger that such ads would be monopolized by the affluent³⁰ or by those of one particular political persuasion;³¹ (2) that there would be further erosion of broadcaster discretion;³² (3) that individual speakers would not be accountable to the public in the way licensees are;³³ and (4) that there would be enlargement of government control over the content of public issues.³⁴ There are three reasons, however, why a contemporary consideration of the issue in the context of a limited right of access created within the Communications Act might well result in the Court striking a different balance.

First and foremost is that the *CBS v. DNC* decision was made with the operation of the Fairness Doctrine as a backdrop. “Of particular importance in light of Congress’ flat refusal to impose a ‘common carrier’ right of access for all persons wishing to speak out on public

27. 412 U.S. at 110.

28. 453 U.S. 367 (1981). Here the Court granted certiorari to determine whether the FCC had properly construed § 312(a)(7) in finding that the major networks’ refusal to sell President Carter 30 minutes of airtime in December 1979 violated their obligation to provide federal candidates reasonable access. In a six-to-three decision, the Court found that this provision, which was added by the Federal Election Campaign Act of 1971, had created a major new right of access and had enlarged the political broadcasting responsibilities of licensees. Justice Burger’s majority opinion also held that the FCC’s interpretation of the provision did not violate the broadcasters’ first amendment rights and that the FCC’s standards requiring broadcasters to evaluate candidate requests for time on an individual basis were warranted. In addition, the Court upheld the Commission’s authority to determine when a campaign has begun and when § 312(a)(7) obligations apply.

29. 453 U.S. at 395, *citing* *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 389.

30. 412 U.S. at 123-4.

31. 412 U.S. at 123.

32. 412 U.S. at 126-7.

33. 412 U.S. at 125.

34. 412 U.S. at 126-7.

issues,” the Court observed, “is the Commission’s ‘Fairness Doctrine’”³⁵ The broadcaster was allowed significant discretion in deciding how best to fulfill Fairness Doctrine obligations, the Court continued, although that discretion was bounded by FCC rules.³⁶ The Doctrine and its component rules are no longer operational, however, and, while a general obligation to cover public issues is contained within section 315(a) of the Communications Act,³⁷ it was the Fairness Doctrine that made this obligation enforceable. Discussing the candidate equal time provisions of this section, Justice White noted in *Red Lion*, “[t]he objectives of § 315 could readily be circumvented but for the complementary fairness doctrine ratified by § 315.”³⁸

The *CBS v. DNC* Court also noted that a policy requiring licensees to accept editorial advertisements could place the operation of the Fairness Doctrine in jeopardy.³⁹ To guarantee balanced treatment, broadcasters might have to make regular programming time available to opposing viewpoints, which would erode their editorial discretion. If broadcasters were relieved of their Fairness Doctrine obligations for purposes of editorial advertising, the Court continued, then the congressional objective of balanced coverage would be threatened.

35. 412 U.S. at 110.

36. 412 U.S. at 111.

37. “Nothing in the foregoing sentence [which refers to coverage of candidates] shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.” 47 U.S.C. § 315(a) (1986).

In 1986, the D.C. Circuit Court of Appeals determined that this language did not make the Fairness Doctrine a binding statutory obligation. *See Telecommunications Research and Action Center (TRAC) v. FCC*, 801 F.2d 501, 517 (D.C. Cir. 1986).

38. 395 U.S. at 382. Justice White went on to explain how a broadcaster could ban all appearances by candidates and give air time only to the supporters of one slate. The station would thus be able to have an impact on the election without incurring an obligation to give time to candidates from the opposing slate.

Similarly, unless the public interest standard of the Communications Act is interpreted by Congress or the FCC as requiring coverage of controversial issues of public concern, a licensee can simply cover those public issues that are not controversial, consider only one side of those that are, or ignore public issues altogether.

In the area of candidate access, Congress eliminated the possibility that licensees might try to circumvent the reasonable access provisions by amending the Communications Act to *require* stations to grant federal candidates “reasonable” free or paid access. *See supra* note 15. An editorial access statute would operate in much the same way to guarantee that controversial viewpoints could not be excluded completely from the airwaves.

39. 412 U.S. at 123-24.

The operation of the Fairness Doctrine is no longer an issue, nor presumably is Congress' interest in balanced presentations. A limited right of access for political information can be implemented, in any case, without curtailing broadcasters' discretion over their own programming. Moreover, it can mitigate the imbalance concern in two ways: by limiting the frequency with which any one viewpoint can be expressed and by creating a rate structure that will increase the number of groups and individuals who can afford to buy time for opposition ads.

Although the *CBS v. DNC* Court determined that neither the statute nor the Constitution mandated a general right of access for individuals, it did not reach "the question of whether the First Amendment or the Act can be read to preclude the Commission from determining that in some situations the public interest requires licensees to re-examine their policies with respect to editorial advertisements."⁴⁰ The Court noted that the judgment of the legislative branch on the question of access could not be undervalued, even though broadcasters' first amendment claims were at issue.⁴¹ The Court added in a later passage, "Conceivably at some future date Congress or the Commission—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable."⁴²

Finally, the Court's *CBS v. FCC* decision, upholding a congressionally created right of access for federal candidates, seems contrary to its earlier refusal in *CBS v. DNC* to recognize access rights for organized political parties. The Democratic National Committee had urged the Court in *CBS v. DNC* at least to recognize a right for national political parties to purchase airtime to discuss public issues, but the Court refused. "We see no principal [sic] means under the First Amendment of favoring access by organized political parties over groups and individuals,"⁴³ the Court stated.

The principled distinction that the Court later recognized when it upheld access rights for political candidates after rejecting similar access rights for political groups seems based on the difference be-

40. 412 U.S. at 119.

41. 412 U.S. at 103. It is important to note that if the statute recommended here were considered by the Court today, it would probably face FCC opposition. The Court makes no reference in any of the three access cases as to how a split in the judgments of the legislative and executive branch would effect its deliberations. Presumably, it would rely on its determination of whether the factual predicate for regulation exists. This is discussed in more detail in the following section.

42. 412 U.S. at 131.

43. 412 U.S. at 127 n.21.

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tween particular obligations that attach when special rights are articulated by the legislature and the more limited duty that attaches to general goals expressed by Congress. The candidates' right was a specific one created when Congress amended the Communications Act to include section 312(a)(7) while the right claimed by the Democratic Party was a general one stemming only from the public interest standard of the Communications Act. Thus, a specific access right such as that proposed in this Current Topic, grounded in the public interest standard and affirmed through amendment of the Communications Act, would be upheld by the Court.

II. The Rationale for Regulation

The legitimacy of any scheme of broadcast access regulation hinges on the permissibility of regulating the broadcast media in a manner that would not pass constitutional muster if applied to print.⁴⁴ As the FCC observed in 1969, "[b]roadcasting is press and something more. . . ."⁴⁵ The varying definitions of that "something more" account for broadcasting's unique treatment in the first amendment context.

A. The Traditional Justification and Its Critics

Specifically, Congress and the courts have based the anomalous treatment of broadcasting on the assumption that it differs from other media in three significant ways: (1) broadcasting uses the inherently scarce electromagnetic spectrum; (2) broadcasting involves public trusteeship, rather than individual ownership of this valuable public resource; and (3) broadcasting has singular perceptual impact and pervasiveness. The third justification is particularly applicable to television, with its simultaneous audio and visual transmission, its presence in virtually all American homes, and the average national viewing pattern of seven hours a day.⁴⁶

44. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

45. *Columbia Broadcasting Sys., Inc. (WBBM-TV)*, 18 F.C.C.2d 124, 131-32 (1969), quoted in A. Shapiro, *Media Access* 17 (1976).

46. The average American household watched TV for 53 hours, 11 minutes each week (7 hours, 36 minutes a day) during January, February, and March of 1987. Homes with pay cable watched about an hour more per day. Thirty-four hours, thirty-eight minutes were spent watching the three major networks during an average week. *TV Viewing Drops by Six Minutes a Day*, *TV Guide*, May 14, 1987, at A-141.

Broadcasters, legal observers, and the FCC have raised questions about the continuing vitality of these distinctions.⁴⁷ Their critique is based first on the idea that scarcity no longer exists in the electronic media due to improved use of the electromagnetic spectrum and development of alternative technologies such as cable, low-power television (LPTV), and direct broadcast satellites (DBS).⁴⁸ Second, they argue that the public trustee system is not necessary and the public would be better served if broadcasting was regulated by the market.⁴⁹ Finally, critics rely on the premise that even if broadcast is more pervasive and has a greater impact than print, effectiveness of a means of communication is not a legitimate justification for its regulation.⁵⁰

This assessment of the current broadcast market is not held unanimously, however.⁵¹ It is significant that Congress does not concur in the FCC's determination that scarcity, and the need for regulation, are gone. Nor does Congress agree that the licensee/trustee system is less effective than the unregulated marketplace in meeting the public interest. Last spring, in the report that accompanied S. 742,⁵² the bill that would have codified the Fairness Doctrine,⁵³ the Senate Committee on Commerce, Science, and Transportation con-

47. See generally Fowler & Brenner, A Marketplace Approach to Broadcast Regulation, 60 Tex. L. Rev. 207 (1982), reprinted in 4 Mass Communication Review Yearbook 645 (E. Wartella, D. Whitney & S. Windahl eds. 1983).

48. *Id.* at 221-26, 659-68.

49. *Id.* The repeal of the Fairness Doctrine was premised on the fact that the public now has access to a multitude of viewpoints due to the explosive growth in the number of information sources in the marketplace and on the fact that the Doctrine "chill[ed]" speech and impeded the coverage of controversial issues. Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143, 169 (1985) [hereinafter Fairness Doctrine Inquiry].

50. "[T]he deficiencies of the scarcity rationale have led some to think that it is the immediacy and power of broadcasting that causes its differential treatment. . . . [W]e are unwilling to endorse an argument that makes the very effectiveness of speech the justification for according it less first amendment protection." *TRAC v. FCC*, 801 F.2d at 508.

51. Belief in the existence of spectrum scarcity, and belief in the ability of the market to better provide for media consumers, are in many ways matters of faith. Proponents of each position gather a wealth of statistical information and wind up drawing diametrically different conclusions. See *infra* text accompanying notes 52-59.

In a recent case, the Supreme Court noted that new technologies might render the scarcity doctrine obsolete, but declined to reconsider its long-standing approach to broadcast regulation "without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." *FCC v. League of Women Voters*, 468 U.S. 364, 376-77 n.11 (1984).

52. Fairness in Broadcasting Act of 1987, Report on S. 742, Senate Comm. on Commerce, Science, and Transportation, S. Rep. No. 34, 100th Cong., 1st Sess. (1987) [hereinafter Fairness Act Report].

53. See *supra* note 3.

cluded that the FCC's Fairness Doctrine findings were "factually flawed," "based on erroneous legal analysis," and "entitled to no deference."⁵⁴ The Committee based its conclusions on its findings that the electromagnetic spectrum remains scarce relative to demand, that the number of broadcast channels is limited (despite the introduction of new audio and video services), and that Congress has permissibly chosen a system whereby a select few are licensed to use the spectrum in return for a commitment to operate in the public interest.⁵⁵ Moreover, to prevent interference among users, the government is still required to allocate spectrum frequencies. The government must still make choices about competing uses of the spectrum, the report noted, pointing to recent battles between the cellular radio industry and public safety officials, the direct broadcast satellite industry and fixed microwave service users, and the proponents of high-definition television (HDTV) and land mobile service providers.⁵⁶

In the Committee's view, growth in the number of broadcast stations does not undercut the scarcity argument because "as long as more people seek licenses to use the spectrum than can be accommodated, there is scarcity."⁵⁷ The same cannot be said of newspapers, the report added. The only bar to start-up and profitable existence of a daily newspaper in many markets is economic, while physical scarcity—the unavailability of room on the spectrum—can prevent even someone with unlimited resources from starting a television station.⁵⁸

The third rationale for the anomalous treatment of broadcasting, that the medium is uniquely pervasive and even invasive,⁵⁹ is one relied on explicitly by the Supreme Court in *FCC v. Pacific Founda-*

54. Fairness Act Report, *supra* note 52, at 4.

55. *Id.* at 13.

56. *Id.* at 20-22.

57. *Id.* at 23.

58. The Fairness Act Report pointed to the example of the Washington Times, a newspaper that was able to begin operation in the Washington, D.C., area in the early 1980s, although no open broadcast frequencies exist in the same market. *Id.* at 25.

59. The FCC argued recently that the impact rationale is a part of the scarcity doctrine. "Implicit in the 'scarcity' rationale is an assumption that broadcasters . . . possess a power to communicate ideas through sound and visual images in a manner that is significantly different from traditional avenues of communication because of the immediacy of the medium." 53 Rad. Reg. 2d (P & F) 1324, *cited in* *TRAC v. FCC*, 801 F.2d at 508.

The D.C. Circuit rejected the FCC's view, however, arguing that "the Supreme Court's articulation of the scarcity doctrine contains no hint of any immediacy rationale." 801 F.2d at 508.

tion,⁶⁰ and implicitly in its discussion of the “captive” broadcast audience in *CBS v. DNC* and other cases.⁶¹ This rationale is largely based on the *perception* that broadcasting is somehow different from print, a difference that has been resistant to empirical measurement.⁶² Yet, regulation still can recognize broadcasting’s unique impact—even if that uniqueness cannot be measured—without attempting to moderate its effectiveness. An editorial ad access plan, in particular, would take advantage of the potency of television and radio for the benefit of political speakers and the public, without constraining their effectiveness in delivering broadcasters’ speech.

The Supreme Court, for its part, has never been wary of recognizing differences among forms of communication and judging media regulation accordingly. The *Red Lion* Court, for example, observed that “[d]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them.”⁶³ In an earlier case, Justice Jackson argued that “[t]he moving picture screen, the radio, the newspaper, the handbill, the sound truck, the

60. 438 U.S. 726 (1978). In upholding the Commission’s power to regulate broadcasts that are indecent but not obscene, Justice Stevens wrote in a plurality opinion, “of all forms of communication, it is broadcasting that has received the most limited First Amendment protection [The] reasons for these distinctions are complex, but two have relevance to the present case. First the broadcast media have a uniquely pervasive presence in the lives of all Americans. . . .” 438 U.S. at 748.

61. The *DNC* Court described the courts’ concern with this characteristic of broadcasting in several cases, including *Public Util. Comm’n v. Pollack*, 343 U.S. 451 (1952) (radio broadcasts are permissible on municipal buses), and *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969) (FCC has power to promulgate regulations regarding cigarette advertising). The *DNC* Court quoted Judge Bazelon’s opinion in *Banzhaf*, 405 F.2d at 1100-01:

Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcasting messages, by contrast, are ‘in the air’. . . . It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word.

412 U.S. at 128.

62. Laurence Tribe’s assessment is representative:

Almost as difficult as conceiving of cumulative trends is imagining the effects of scale. Barely 100,000 television receivers were in use in the United States in 1948. In the next year there were a million. A decade later there were 50 million. The social and psychological consequences of phenomenal growth are hard even to contemplate, let alone predict. Indeed, in the case of television these effects are still a matter of debate, and apparently adequate research tools for measuring or evaluating them do not yet exist.

L. Tribe, *Channeling Technology Through Law* 29 (1973).

63. 395 U.S. at 386-87, *citing* *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952).

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street corner orator have differing natures, values, abuses, and dangers. Each . . . is a law unto itself. . . ."⁶⁴

B. Distinctions In the Use of Broadcast and Other Media

From the perspective of conveying political information, broadcasting and print are very different.⁶⁵ For example, even though most viewers spend only 15% of their television time watching newscasts,⁶⁶ two-thirds of all Americans claim to receive most of their news from television.⁶⁷ The trend toward television as the primary source of news has accelerated since 1980; 50% of those asked in a nationwide poll conducted in 1986 said television was their only source of news compared to 39% answering the question in 1980.⁶⁸ More than twice as many people polled in 1986 said that they would trust a report they heard on television than would trust a conflicting item in a newspaper.⁶⁹ Eighty-four percent of those contacted in a TV Guide/Opinion Research Corporation poll in September and October of 1987 said that their choice for president will be influenced by how the candidates perform in televised debates.⁷⁰ Voter polls taken two to three days before various primaries this year sug-

64. *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring) (state interest in privacy justifies prohibition of sound trucks operating at a loud and raucous volume).

Thus, films can be subjected to a degree of prior review that would be unthinkable if applied to books, and otherwise protected speech that is indecent, but not obscene, can be regulated on the airwaves. See *Freedman v. Maryland*, 380 U.S. 51 (1965) (system of prior submission permissible for motion pictures if it contains adequate procedural safeguards); *Bantam Books v. Sullivan*, 372 U.S. 58 (1963) (state juvenile delinquency commission's informal recommendations to book distributors represent unconstitutional censorship); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (civil sanctions can be imposed on a broadcaster for airing patently offensive monologue).

65. [I]nformation is conveyed far more vividly by television's combination of words, voices, and pictures than by the faceless and voiceless words of newspapers. Perhaps that explains why most Americans consume more political news from television than from newspapers and why they rely more on the accuracy of what they see on television than on what they read in the newspapers. In any event, television newscasts and public affairs programs unquestionably constitute the major source of political reality for most Americans.

A. Ranney, *Channels of Power, The Impact of Television on American Politics* 16 (1983).

66. *Television Dimensions '88*, at 158 (E. Patazian ed. 1988). This figure includes cable services.

67. *Television Information Office/Roper Organization, America's Watching: Public Attitudes Toward Television* 18 (1987) (survey conducted in Dec. 1986).

68. *Id.* at 4.

69. *Id.* at 18.

70. *Lipton, Campaign '88 and TV: America Speaks Out*, *TV Guide*, Jan. 23-29, 1988, at 3.

gest that last-minute television advertising by candidates can have an impact on viewers as well.⁷¹

Differences in the ways that broadcasting and other media are relied upon by citizens in gathering information to make political decisions bear on arguments that newer technologies have rendered broadcast regulation obsolete. The first concern raised by the eventual replacement of television and radio by new audiovisual technology is availability. At present television is the only medium available to virtually the entire population at no direct cost.⁷² Projections of the ultimate increase in alternative electronic media, by contrast, are for much less than 90-plus percent availability. Currently, use of these technologies hovers at about 44% of all American homes for cable, 0.63% for multipoint distribution systems, and 0.19% for satellite master antenna systems (SMATV).⁷³ There are some 428 low-power television stations, each with a reach about one-tenth the size of a typical television service area.⁷⁴ Direct broadcast satellite service and multichannel multipoint distribution systems are not yet on the market.⁷⁵

Even if these alternatives become available to the majority of the population, their affordability may pose an obstacle to widespread use.⁷⁶ Political scientist Christopher Arterton warned a House committee in 1983 that the diffusion of new communications technolo-

71. Earlier this year, a New York Times/CBS News Poll indicated that television commercials helped produce "dramatic shifts" in voter sentiments in the last days of the February 1988 Super Tuesday primaries campaign. O'Neill, *Let Surrogate Candidates Smile for TV*, N.Y. Times, Apr. 9, 1988, at A31. This finding corresponds to that of Thomas Patterson and Robert McClure in the 1972 elections that individuals gained considerable issue information from political advertising. T. Patterson & R. McClure, *The Unseeing Eye* 23 (1976).

72. One network executive observed that the development of new programming technologies merely "underscore[s] the singular role of network television—which remains our only true mass medium—as the only shared experience that crosses over all the differences that characterize this vast and varied nation." Speech by John Severino, ABC, to Arizona Broadcasters Ass'n, Nov. 11, 1984, at 2, *cited in* Ferris & Kirkland, *Fairness—The Broadcaster's Hippocratic Oath*, 34 Cath. Univ. L. Rev. 605, 611 (1985).

Paul Starr has noted that a broadcast television program is a public good in an economic sense because, "one person's consumption does not preclude another's; and excluding anyone from consumption is costly, if not impossible." Starr, *The Meaning of Privatization*, 6 Yale L. & Pol'y Rev. 6, 15 (1988).

73. Fairness Act Report, *supra* note 52, at 24.

74. *Id.*

75. *Id.*

76. At a recent Congressional hearing, Senator Howard Metzenbaum displayed a list of 93 markets where basic cable rates have increased more than 50% since Congress deregulated rates in 1987. The National Association of Attorneys General has also begun a probe of anticompetitive practices by cable operators: raising prices and dropping channels. "This has really hurt people on fixed incomes," says task force leader Charles Brown, attorney general of West Virginia. Update, TV Guide, Apr. 2-8, 1988, at A1-A2.

gies could exacerbate social class differences in the receipt of political information:

These differences are already clearly present; my concern is that they will be intensified as communications media evolve Many of the newer media will probably carry specialized messages to particular audiences. For some, these channels will produce a rich abundance of information about politics. In the process, however, the general audience may be given less exposure to political information.⁷⁷

Political scientist Benjamin Ginsberg has noted that evidence indicates that "[a]mong lower-class viewers and readers, political attitudes and extent of media use are highly correlated,"⁷⁸ while for upscale audiences, attitudes are not related to levels of media exposure.⁷⁹

In his study of the 1976 presidential election, Thomas Patterson discovered that television provided less-informed citizens of low and moderate interest with information that they did not gain elsewhere. This finding, he noted, confirmed previous studies.⁸⁰ Patterson's earlier study with James McClure of the 1972 election revealed that voters gained considerable candidate issue information from political advertising on television—particularly voters at low education and income levels.⁸¹ The evolution of a segmented communications marketplace could halt this pattern of efficient information dissemination.⁸² Pay alternatives could create a stratification between the higher-income, politically literate, who can afford to buy targeted media featuring public affairs programming, and the lower-income,

77. Broadcast Media in Elections: Hearing Before the Task Force on Elections of the Comm. on House Administration and the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 98th Cong., 1st Sess. 89-90 (1983) (testimony of Dr. Christopher Arterton, Department of Political Science, Yale University) [hereinafter *Broadcast Media in Elections*]. See also C. Arterton, *Teledemocracy: Can Technology Protect Democracy* 203 (1987); Elliott, *Intellectuals, the "Information Society" and the Disappearance of the Public Sphere*, in 4 *Mass Communication Review Yearbook*, *supra* note 47, at 569.

78. B. Ginsberg, *The Captive Public: How Mass Opinion Promotes State Power* 146 (1986).

79. *Id.* at 146-47.

80. Interestingly, the major source of this information was not evening newscasts but television's special broadcasts, such as conventions and debates. T. Patterson, *The Mass Media Election* 165, 192 n.8 (1980).

81. "In fact, during the short period of the general election campaign, presidential ads contain substantially more issue content than network newscasts. This information is particularly valuable to people who pay little attention to the newspaper. Advertising serves to make these poorly informed people substantially more knowledgeable." T. Patterson & R. McClure, *supra* note 71, at 129.

82. Broadcast technology "supplants atomized, relatively informal communication with mass media as a prime source of national cohesion and news . . ." *Red Lion*, 395 U.S. at 386 n.15.

politically illiterate, who will only be able to afford entertainment-oriented, commercial advertiser-supported television.

The ultimate availability of a multitude of channels at affordable rates may not mean an increase in the diversity of the marketplace for political ideas if all the channels remain in a few hands. Concentration of broadcasting power was a major concern of the drafters of the Communications Act.⁸³ Historically, concentration has enabled broadcasters to limit the dissemination of messages with which they did not agree.⁸⁴ While FCC regulations prohibit single ownership of both a daily newspaper and a television station in the same community, the FCC has few structural regulations affecting ownership of other media. By 1981, 38% of the cable systems were owned by television companies and another 25% by publishing firms.⁸⁵ The movement in the cable industry to integrate vertically by owning both programming and franchises only exacerbates the likelihood that programming geared to small audiences will have trouble finding an outlet.⁸⁶ Furthermore, even structural mechanisms that successfully ensure diversity of ownership in the media marketplace cannot ensure diversity of viewpoints, if most in the industry share the same values and commitment to the preservation of the system.⁸⁷

Even if a wide variety of opinion outlets eventually develops, public debate may be constrained rather than enhanced. The relegation of controversial viewpoints to channels with small audience reach combined with audiences' propensity to choose, or at least to pay more attention to, information with which they agree might insulate viewers from exposure to new opinions. Communications research suggests that audiences select information that reinforces their beliefs and interests to some extent. Democrats, for example, are more attentive to news of their own primaries, Republicans, to news of their party representatives.⁸⁸ By contrast, the metaphor of truth

83. See F. Rowan, *Broadcast Fairness: Doctrine, Practice, Prospects* 27-32 (1984).

84. See I. Pool, *Technologies of Freedom* 119-129 (1983) for a discussion of private radio censorship of political and other speakers and of government attempts to influence broadcast content in the 1920s and 1930s.

85. *Id.* at 49-51.

86. For example, in 1986 the New York Citizens Committee on Cable Television filed suit against Manhattan Cable Television, charging the company with illegally denying some pay-television services access to its system. In March 1988 the suit was settled when Manhattan Cable agreed to add two or more pay movie services within the next year. See *Is Cable Cornering the Market?*, N.Y. Times, Apr. 17, 1988, § 3, at 12.

87. For a more complete discussion of this point, see Carter, *Technology, Democracy, and the Manipulation of Consent*, 93 Yale L.J. 581, 600 n.107 (1984).

88. T. Patterson, *supra* note 79, at 84.

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winning out in the marketplace of ideas suggests an exchange of views, a lively debate. The vision of the Socialists watching their cable channel, the Libertarians their satellite broadcast, and the Independents their low-power television programs casts some doubt on the promise that myriad outlets will result in a multitude of ideas being shared. Everything important may get said, but no one important—i.e., the uninformed or undecided—may be listening.

III. *The Constitutional Questions*

The Supreme Court has consistently recognized that “[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than countenance monopolization of that market, whether it be by the Government itself or a private licensee.”⁸⁹ The Congress has found that scarcity of the electromagnetic spectrum continues and that, where and when new video and audio services are available, they do not provide meaningful alternatives to broadcast stations for the dissemination of news and public affairs.⁹⁰ The question that remains unanswered is whether the first amendment requires Congress to remain neutral while the communications market develops into one that provides political information only to some. Or does the first amendment permit Congress to continue some degree of broadcast regulation in order to ensure that at least one communications medium conveys political information from diverse sources to the public at large?

The Supreme Court has suggested that the Congress, through the FCC, *can* use the broadcast licensee system to correct imperfections in the marketplace of ideas. “We see nothing in the First Amendment to prevent the Commission from allocating licenses so as to promote the ‘public interest’ in diversification of the mass communications media,” the Court noted in *FCC v. National Citizens Committee for Broadcasting*.⁹¹ At least one congressional committee has concurred, arguing recently that “the government’s affirmative involvement in broadcasting presents the opportunity for government to fashion regulatory regimes creatively in order to vindicate a range of

89. *Red Lion*, 395 U.S. at 390, *citing* *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

90. Fairness Act Report, *supra* note 52, at 34-35.

91. 436 U.S. 775, 799 (1978).

first amendment interests left unprotected by a strict separation between government and the system of freedom of expression.”⁹²

Legal theoreticians, too, suggest the permissibility of government action to advance first amendment values.⁹³ To Alexander Meiklejohn, Congress is not merely permitted to act to broaden public debate, it has “a heavy and basic responsibility to do so.”⁹⁴ The primary purpose of the first amendment is a public, not private, one, aimed at guaranteeing that individuals understand the issues that bear upon their lives as citizens. “That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information may be kept from them.”⁹⁵ The freedom of thought needed for self-governance can be increased by an unhindered flow of accurate information.⁹⁶ Thus, Congress can act to enlarge and enrich the freedom of speech and to “cultivat[e] the general intelligence upon which the success of self-government so obviously depends.”⁹⁷

More recently, Lee Bollinger of the University of Michigan Law School has argued that Congress can act to create access rights to the broadcast media. Even if scarcity, government licensing, and pervasiveness do not render broadcast analytically distinct from print, he suggests:

Congress ought still to be permitted to provide that the opportunity to reach the television audience will not depend entirely on private ownership. As is true now, the government should be able in one forum to balance the freedom of press interests of those owning established channels of communication against the interests of those effectively excluded from major avenues of communication.⁹⁸

Bollinger concedes that access regulations may have “adverse consequences for the marketplace of ideas.”⁹⁹ They may create a disincentive for broadcasters to cover public issues. Access rights also create the risk that the administrative mechanism necessary to implement them will wind up intimidating the press into toeing an official line. Bollinger observes that “[s]uch a regulatory structure

92. Fairness Act Report, *supra* note 52, at 17.

93. See generally Emerson, The Affirmative Side of the First Amendment, 15 Ga. L. Rev. 795 (1981). See also Fiss, Free Speech and Social Structure, 71 Iowa L. Rev. 1405, 1416 (1986) (“When the state acts to enhance the quality of public debate, we should recognize its actions as consistent with the first amendment”).

94. A. Meiklejohn, Political Freedom 20 (1948, rep. 1979).

95. *Id.* at 75.

96. *Id.* at 19.

97. *Id.* at 20.

98. Bollinger, Freedom of the Press and Public Access, 75 Mich. L. Rev. 1, 39 (1976).

99. *Id.* at 29-32.

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would stand as a constant temptation to government officials . . .”¹⁰⁰ Access regulation may also have a tendency to beget more regulation, a drawback which Bollinger warns should not be underestimated, because once in place a regulatory scheme gone awry will be hard to dismantle.¹⁰¹

Access regulation can be structured, however, to minimize the dangers that concern Bollinger. Disincentives to broadcasters to cover certain issues, for example, can be overcome through the creation of access schemes that are not contingent upon broadcasters’ coverage of those issues and that do not include licensee reply requirements. Such schemes also contract the sphere within which the government can make arbitrary or self-interested decisions regarding broadcasters’ speech. Systems that operate as mechanically as possible minimize the grounds for viewer or would-be speaker complaints. They also partially insulate broadcasters from administrative agency intrusiveness. It is easier to measure objectively the procedural fairness of a first-come, first-served system, for example, than to judge the substantive fairness of one allowing broadcasters discretion in who speaks. The concern that access regulation is likely to lead to expanded regulation argues for step-by-step implementation of any access proposal or for sunset provisions that will prevent the retention of counterproductive regulations through bureaucratic inertia.

Because access regulation is both “dangerous and desirable,” Bollinger recommends a system of partial regulation. Only under such a system can the citizenry risk the degree of government intervention necessary to achieve the rewards of public access.¹⁰² The partial regulatory system itself provides an effective check against the possible cost of access regulation, Bollinger adds. If the regulated broadcast media sector foregoes coverage of some issue or event, the public will still be informed through the unregulated print media. If government interference chills broadcasters’ speech, the unregulated print press remains free to serve as watchdog. Once the print press has covered an issue, or criticized the government, the pressure on the broadcast media to report that criticism increases considerably. The result, Bollinger contends, is a “beneficial tension” between the regulated and unregulated sectors—cov-

100. *Id.* at 31.

101. *Id.* at 32.

102. *Id.* at 32. For a contrary view, see L. Powe, *American Broadcasting and the First Amendment* 6 (1987).

erage in one serving as a competitive prod to coverage in the other.¹⁰³

IV. *Ad Hoc Access in Action*

Once it is determined that the dissemination of diverse viewpoints is a legitimate first amendment goal that Congress can seek to ensure through the broadcast media, the case for intervention in the current licensee-governed system of editorial advertising regulation is a strong one. Broadcasters' affirmative obligation to provide diverse voices from the community is gone; their incentive to do so voluntarily is slight; and, in practice, their treatment of advocacy advertisement is inconsistent and arbitrary.

All three major commercial networks have policies precluding the sale of time for editorial advertising during network programming and during local programming on their owned-and-operated stations.¹⁰⁴ The result is a virtual blackout for issue speakers wishing to reach television's largest audiences; 70% of all television sets are tuned to the three major networks during primetime.¹⁰⁵ Independent stations and network affiliates have individual policies for the advertising time they control; they may relegate these ads to late hours, sell them time selectively or indiscriminately, or not accept them at all.

When the Fairness Doctrine was in operation, the airing of ads promoting one side of a controversial question required a station to act in one of three ways: (1) to allow a spokesperson or group with an opposing view to buy rebuttal time; (2) to cover the opposing side's viewpoint on news and public affairs programming; or (3) to offer free time to a spokesperson for the opposite view.¹⁰⁶ This system provided broadcasters with editorial discretion to the extent that they could choose both the initial message and the speaker to represent the opposing view. It imposed a constraint, however, to

103. *Id.* at 33.

104. Telephone interviews with Harvey Dzodin, Director of Broadcast Standards and Practices, American Broadcasting Co. (Mar. 17, 1988); George Dessart, Vice President Program Practices, Columbia Broadcasting Co. Broadcast Group (Mar. 17, 1988); and Richard Gitter, Vice President Broadcast Standards, National Broadcasting Co. (Mar. 16, 1988); Interview with Richard Gitter (Aug. 13, 1986) [hereinafter Network Interviews].

The single exception to this network policy is an experimental program for the sale of editorial advertisements at the NBC owned-and-operated station WRC in Washington, D.C.

105. R. Heath & R. Nelson, *Issues Management: Corporate Public Policymaking in an Information Society* 233 (1986).

106. *CBS v. DNC*, 412 U.S. at 111.

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the extent that it obligated them to act, by locating a speaker or speaking themselves, each and every time advocacy ad time was sold. In addition, it required licensees to keep rough track of how much coverage they gave to controversial points of view and during what part of the day, and to measure that against the coverage they gave to opposing opinions. These requirements discouraged the acceptance of editorial ads—and coverage of controversial topics altogether. This “chilling effect”¹⁰⁷ was a major rationale for the FCC’s repeal of the Fairness Doctrine.

The operation of the old regime was no more satisfactory to those wishing to speak. Defining issues as “noncontroversial” enabled stations to run advocacy ads without incurring a reply obligation.¹⁰⁸ Defining an ad as controversial meant exclusion from the networks and selective treatment by local stations. Noncontroversial designations were applied inconsistently, which resulted in mixed patterns of acceptances and rejections from ad to ad, station to station, and market to market.¹⁰⁹

107. The 1985 Fairness Doctrine Inquiry noted the “chilling effect” of the Fairness Doctrine on broadcasters’ speech. Fairness Doctrine Inquiry, *supra* note 49, at 246.

There is a difference between the “chill” a broadcaster feels because airing a particular story or viewpoint will cost him in later coverage or free time and the “chill” felt by speakers who believe exercise of their first amendment rights will result in government retaliation. The statute proposed herein attempts to eliminate the first cost of controversial speech and to better insulate the broadcaster from government involvement than did the former Fairness Doctrine regime, which should mitigate to some extent the possibility for punitive government action.

108. In the “Yes to Stop Callaway” matter, for example, the FCC found that a television station did not violate the Fairness Doctrine by airing a series of some 300 30-second spots arguing the need for a nuclear power plant then under construction without airing any spots opposing the need for the plant. The FCC decided that since a construction permit had already been granted by the time the spots aired, the licensee did not act unreasonably in concluding that the “need” for the plant was no longer a controversial issue of public importance. (One cannot help but wonder, however, why anyone would purchase 300 spots to discuss an issue that was moot.) The complainant, the Yes to Stop Callaway Committee, argued that the FCC and the station construed the issue of controversy too narrowly, particularly since the question of the plant’s advisability was to be considered again in utility rate base hearings to be held after the ads were shown. Yes to Stop Callaway Committee, 56 Rad. Reg. 2d (P & F) 989 (rel. Aug. 9, 1984).

109. The experience of the W.R. Grace & Co. and its anti-deficit spots is illustrative. In 1984, the company prepared an ad that suggested that the federal deficit would be paid for by future generations. It aired on all three major networks. In 1985, the company prepared a follow-up spot that suggested failure to reduce the federal deficit would lead to economic collapse. All three networks initially refused to run the spot because it was “controversial,” although many independent stations and network affiliates agreed to run it. In newspaper op-ed pages across the country company Chairman Peter Grace and his legal counsel Joseph Califano called the networks’ enforcement of their issue advertising policies “inconsistent and capricious,” noting that the networks accepted ads urging Americans to buy goods “Made in America,” and spots produced by the Com-

Unfortunately, there are several reasons why the end of the Fairness Doctrine's reply-time requirements is unlikely to spur broadcasters to create an expanded forum for opinion. The three major networks have retained their blanket bans, claiming a preference for covering such subject matter in their news and public affairs programming.¹¹⁰ Left unsaid is the fear that viewpoint ads might not provide an ideal environment for the broadcast of their commercial counterparts; they might be too negative, too inflammatory, and so forth. The broadcasting industry is in the business of selling audiences to advertisers, audiences with a proclivity for buying a sponsor's product, and any advertising that might offend and possibly diminish that audience is not likely to be actively encouraged.¹¹¹

As for the likelihood of expanded licensee coverage of controversial issues in regular news and public affairs programming—as those who supported the end of the Fairness Doctrine projected—such a likelihood is similarly minimized by the growing commercialization of such programming and its consequent need to remain noncontroversial to maximize audience size. In its early years television news was considered a “loss leader,” provided more for station prestige than for profit. But by the 1970s, news programs had demonstrated an ability to make money. News divisions at the networks recently have entered a period of intense competition, during which the distinctions between news and commercial programming have grown less clear,¹¹² and pressures to remain noncontroversial to attract the largest audiences possible have increased. Escalating costs of news production and cuts in network news budgets are ad-

mittee for Energy Awareness promoting coal and nuclear power. *Networks vs. Free Speech*, N.Y. Times, June 12, 1986, at A31.

Eventually CBS agreed to air the advertisement after support for the balanced budget amendment was deleted. CBS Agrees to Air “Issue Ad” Depicting Deficit Trial, *Christian Sci. Monitor*, Aug. 20, 1986, at 3.

110. Network Interviews, *supra* note 104.

111. In his dissent in *CBS v. DNC*, Justice Brennan noted that “angry customers are not good customers and, in the commercial world of mass communications it is simply ‘bad business’ to espouse—or even to allow others to espouse—the heterodox or controversial.” 412 U.S. at 187 (Brennan, J., dissenting). See also Jaffe, The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access, 85 Harv. L. Rev. 768, 773 n.26 (1972) (there is a considerable possibility that the broadcaster will engage in self-censorship and avoid as much controversy as he can); Barron, *supra* note 6, at 1646 (the mass media harbors “antipathy” to unorthodox ideas).

112. Hallin, We Keep America on Top of the World, in *Watching Television* 24-25 (T. Gitlin ed. 1986).

ditional reasons to anticipate that any new public affairs offerings will be aimed at attracting mass, rather than targeted, audiences.¹¹³

In general, newspapers and periodicals can afford to provide more diverse material than television programmers. Because of the self-selection a reader makes, publishers can sell their entire product to individuals who want particular articles and will ignore others. By contrast, listeners and viewers—at least those without videocassette recorders—must often watch a news broadcast in its entirety to see a segment in which they are interested, or they must make a decision among stations as to which one is likely to provide the program with the greatest number of interesting segments.¹¹⁴ Broadcasters cannot take a chance that any one item will lead a viewer to reject the rest of the broadcast or forego the program in the future.

Individual newspapers and magazines differ from broadcast television, too, in the fact that they are generally supported through a combination of advertiser and reader payments. The reader contribution to revenues enables them to reflect the interests of readers with strong preferences to a degree that over-the-air television cannot due to the absence of viewer-supported markets.¹¹⁵

V. Implementing a Right of Access for Issue Advertisements

The structure of the broadcast industry does not encourage the airing of diverse views. Nor is the general public interest require-

113. The news divisions of the three major networks, for example, suffered hundreds of thousands of dollars in cuts in 1986. Diamond, *The Big Chill*, *New York Magazine*, Aug. 11, 1986, at 22.

Even if television stations continue to produce the same amount of information programming, it could be argued that it would be insufficient to inform the public. The average is 340 minutes a day of national and local news or approximately 11 half-hours each day. When set into newspaper type, a 30-minute national news script is the equivalent of less than two columns of the *New York Times*. Ranney, *supra* note 65, at 46, 67. Even assuming that two columns of the *Times* is equivalent to an entire page of an average newspaper, an individual watching every news program offered on an average channel in a given day would only get about 11 pages worth of information.

114. One commentator suggests that this difference makes the case for content regulation of daily newspapers weaker than for broadcasting—even though newspapers are also scarce in some markets. Brennan, *Economic Efficiency and Broadcast Content Regulation*, 35 *Fed. Comm. L.J.* 117, 133 n.37 (1983).

115. *Id.* at 129. Thus a monthly magazine like *Consumer Reports* can exist solely on subscriber revenues, while a magazine like *Modern Bride* contains literally hundreds of pages of advertising, has few subscribers, and relies instead on newsstand sales of only one or two issues to an individual consumer in a lifetime.

In the U.S. 48.3% of magazine revenues, over 75% of newspaper revenues, and nearly all television revenues are from advertising. Figures compiled from Magazine Publishers Assoc., 1986 Financial Survey 1, (1986); Newspaper Advertising Bureau, *Annual Advertising Expenditures 1* (Feb. 29, 1988); Newspaper Advertising Bureau, *Circulation Revenue Rep't* (Aug. 1987); J. Servan-Schreiber, *The Power To Inform* 53 (1974).

ment of the Communications Act adequate to ensure that a broad spectrum of controversial opinions on public issues will be aired on the broadcast media. As a consequence, greater dissemination of political information can only be *guaranteed* by congressional amendment of the Communications Act. An amendment requiring acceptance of advocacy advertising will ensure that a greater diversity of political ideas is presented to the viewing public.

A. Statute Specifics

The statute proposed in this Current Topic includes the following provisions: (1) advocacy advertisers will be provided "reasonable access" to buy time for their views; (2) reasonable access for the purpose of this statute is defined as a minimum of one minute every two hours between the hours of 6 a.m. and 12 p.m.; (3) no more than 10% of the total time allotted to editorial advertising in a calendar month will be provided to a single viewpoint on a single issue; (4) ads are to be accepted on a first-come, first-served basis, for no longer than one month at a time; (5) viewpoint advertisers will be able to purchase time in the furtherance of this obligation at the lowest available unit rate for the applicable time slot; (6) licensees will be indemnified from libel liability for any information that appears in an issue advertisement; (7) ads that endorse or oppose political candidates are not granted access under this statute; and (8) ads that attack the character, honesty, integrity, or personal qualities of an identifiable individual or group are not granted access under this statute.

The 10% restriction on particular viewpoints can be enforced administratively to minimize licensee or FCC involvement in content evaluations by asking issue advertisers themselves to identify the issue their spot is designed to address. In the event that the station determines that the advertiser has mischaracterized the issue in order to evade the 10% ad time limit, the station shall relabel the issue involved, and the FCC will provide ultimate administrative review. This provision should encourage the preparation of single-issue ads—which are presumably more comprehensible in a short time frame—since advertisers are not likely to lose their opportunity to gain access twice by placing two issues in a single advertisement. The 10% restriction aims to maximize the number of voices and views aired and to preclude any one group from appearing frequently enough to persuade rather than merely inform.

The single-month sales period restriction is designed to prevent wealthy groups from buying up time to run a single viewpoint message for month after month. This operates on the assumption that it is more interesting for viewers, and possibly even more informative, to hear even similar viewpoints advocated in different ways. Both the 10% per month frequency limitation and the single month sales period should serve as disincentives for commercial advertisers to recast their messages to take advantage of low rates. Sponsors are unlikely to invest the money to produce an ad that can air only a few times per month.

The provision regarding rates for editorial advertising is comparable to that requiring stations that sell ads to federal candidates to charge the lowest unit rates in the period 45 days before a primary election and 60 days before a general election.¹¹⁶ This statute would provide licensees the same protection for libel liability as they are now provided for candidate advertising. Under section 315(a), a broadcaster cannot censor a "use" of a broadcast station by a legally qualified candidate for public office. The Supreme Court has held that since stations are not allowed to control what candidates say or do on these programs, the station cannot be liable in civil suits for libel.¹¹⁷ The libel liability limitation and personal attack or political endorsement exclusion speak to the concern raised by the *CBS v. DNC* Court, that individual speakers are not accountable to the public. Under this statute, speakers attacking or libeling other individuals or groups are not to be granted access. Should a station air a personal or libelous attack inadvertently, the group or individual making the attack would be fully liable under the applicable state laws.

In addition to meeting its primary objective of increasing the diversity of viewpoints on the airwaves, this regulatory scheme has several advantages. The presentation of political information that cannot be censored by station operators, for example, may serve as a partial counterweight to any reluctance those beholden to the government for their licenses might feel about airing criticism of the status quo.¹¹⁸

116. 47 U.S.C. § 315(b)(1) (1982).

117. *Farmers Educational and Cooperative Union of America v. WDAY, Inc.*, 360 U.S. 525 (1959). See also Federal Communications Commission, *The Law of Political Broadcasting and Cablecasting: A Political Primer* 42 (1984).

118. A former FCC attorney pointed out in the *New York Times* that the elimination of the Fairness Doctrine would have the ironic consequence of enabling the FCC, through its choice of who gets a license, to determine which viewpoints are aired. Letter, Robert I. Field, *N.Y. Times*, Apr. 15, 1984, § 4, at 8.

This reasonable access proposal will also allow the voices of adherents to be heard articulating their own viewpoints—a benefit identified by the Supreme Court in *Red Lion*¹¹⁹ and *CBS v. DNC*,¹²⁰ and by the FCC when the Fairness Doctrine was enforced.

This proposal has the significant added advantage of being administrable without requiring broadcasters to alter their own speech to provide balance. Thus, administration should be far less burdensome than under the previous Fairness Doctrine scheme. In fact, because it requires little content monitoring of advertisements, this system should prove less complicated than that in place for commercial spots.¹²¹

B. Criticisms of the Editorial Advertising Access Statute

This proposed statute might be faulted for not completely eliminating the danger that the Court spoke of in *CBS v. DNC*: that wealthy groups will be able to determine the public affairs agenda of the nation because only they will have the funds necessary to buy time.¹²² The limitation on costs and frequency of individual messages mitigates this effect. While lowest unit rates will not enable many groups to buy 60 seconds on NBC's *The Cosby Show*, they will enable some groups to purchase time locally.¹²³ The limitation on the number of spots aired on any one viewpoint also limits the effect of wealth dominance. Another way of equalizing opportunities for groups to buy time (though one beyond the scope of this article) would be for Congress to fund a program of matching grants, based on the size of a group's membership. In any case, the absence of the Fairness Doctrine's requirement that various sides of controversial issues be presented means that currently only the

119. 395 U.S. at 392 n.18, citing *J. Mill, On Liberty* 32 (R. McCallum ed. 1947).

120. 412 U.S. at 112.

121. NBC's Broadcast Standards Department, for example, reviews 50,000 commercials annually in script and storyboard for such things as tasteful copy, supportable health care claims and substantiated product comparisons. National Broadcasting Co., NBC Broadcast Standards for Television, Advertising Guidelines (May 1983). Twenty-two thousand of these ads are finally produced; 12,000 to 14,000 are aired. Interview with Richard Gitter, NBC, Network Interviews, *supra* note 104.

122. Judge Ralph Winter has argued that wealthy donors support causes across the political spectrum, a factor that should reduce the danger that a privately financed editorial advertising access scheme will skew public debate toward either the right or left. See Winter, Political Financing and the Constitution, 486 Annals 41 (July 1986).

123. Robert Somerville, President of Independent Television Sales, estimates the cost of a 30-second spot airing on a program with a 5 rating, reaching 4 1/2 million households on independent broadcast stations nationwide, would be approximately \$18,000. Lowest unit rate for the same spot could be as low as 1/2 of that price. Telephone interview with Robert Somerville, President, Independent Television Sales (Apr. 25, 1988).

wealthy can purchase access—the very system that concerned the Court.

The reasonable-access-for-ads plan might also be criticized for its use of the thirty-second and one-minute formats for the expression of political information. In *CBS v. DNC*, for example, the networks explained that such information was better conveyed in longer public affairs programming.¹²⁴ That claim remains one justification for the editorial advertising policies at the networks.¹²⁵ There is some irony in this argument, however, as it is uncommon for an interviewee on the evening news to speak any longer than 10-15 seconds.¹²⁶ News stories are often as short as 90 seconds,¹²⁷ and each appears only once or twice, while editorial ads may have the advantage of being viewed repeatedly, increasing comprehension.

The newspaper editorial ad, as the Court pointed out in *New York Times v. Sullivan*,¹²⁸ constitutes an important outlet for the promulgation of political information and ideas (available at least to those who read newspapers); these often contain no more text than could be read aloud in one or two minutes.¹²⁹ In addition, this access proposal would not preclude licensees from selling time for longer presentations; such presentations would simply need to be kept within the 10% of total time allocated to that issue that month.

The most important argument in favor of the short-segment format is that, for much of the population, it works.¹³⁰ Short ads cap-

124. 412 U.S. at 118 (licensees' policy against editorial spot ads is expressly based on a journalistic judgment that 10- to 60-second spot announcements are ill-suited to intelligible treatment of public issues).

125. Network Interviews, *supra* note 104.

126. "The average 'sound bite' is about ten seconds and this has important consequences for what can be said. One can express a stripped-down feeling or attitude in ten seconds but it is rather difficult to make an argument. It is also very difficult to step outside of conventional modes of thought: to frame an issue in a way that is unfamiliar to the audience requires time for an explanation." Sound bites averaged 40 seconds in the 1960s and early 1970s. Hallin, *supra* note 112, at 18-19, 26.

127. The average television news story is only 90 seconds long, and political coverage generally brief. In the 1976 presidential election, a study of candidates' issue positions found they were generally covered in television news segments of 20 seconds or less. T. Patterson, *supra* note 80, at 26, 159.

A new news program, produced along the lines of the newspaper USA Today, plans to provide 35 items per 30-minute episode. Get Ready for McRath, Time, Apr. 11, 1988, at 78.

128. 376 U.S. 254, 266 (1964), *cited in CBS v. DNC*, 412 U.S. at 192 (Brennan J., dissenting).

129. For several examples of such ads, prepared by unions, corporations, and non-profit groups, see P. Sethi, *Advocacy Advertising and Large Corporations* 21-52, 312-17 (1977).

130. Thomas Patterson and Robert McClure find the argument that half-hour broadcasts can better explicate complex campaign issues flawed in two ways: "First, and most important, it overlooks a crucial difference between advertising spots and longer broad-

ture audiences, and audiences built by entertainment can be reached effectively with political information.¹³¹ This effectiveness is due, in part, to the fact that the number of people who will tune in to explicitly political programming is small.¹³² Moreover, audiences most likely to choose political programming are generally already better informed than those least likely to watch such shows.¹³³

It also could be argued that this proposal will encourage broadcasters to cut their own public affairs coverage, on the assumption that the sale of editorial advertisements fulfills their responsibility as public trustees. It would be a simple matter, however, for the FCC to rule that editorial advertisements are a mere adjunct to the political programming a licensee is required to present to meet the public interest standard. Also, if the FCC does not view the presentation of political programming as an essential licensee responsibility, this statute and the complementary candidate access statute would ensure that all listeners and viewers would be at least minimally informed.

There are at least five possible regimes for the future handling of public affairs programming: (1) the FCC will require some public affairs programming and such programming will be supplemented by issue ads affordable only by the affluent; (2) the FCC will require no political programming and only the views of the wealthy will be heard; (3) the FCC will require no political programming and none will be aired; (4) the FCC will require no political programming but limited access for editorial advertisements will be permitted; or (5) the FCC will require some political programming, which will be supplemented by a system of limited access for editorial advertisements. Of the five, it is clear that the fifth, which combines the editorial ad access statute and a political programming requirement,

casts. People watch spots. Longer programs get turned off. Second, it exaggerates the consequences of commercial brevity." Many 60-second spots contain as much relevant content as a basic issue story on the nightly news, with 5-minute spots containing the same content as a newspaper article. And infrequent newspaper readers, those less likely to be informed, are also the television viewers least likely to watch a 30-minute political broadcast. T. Patterson & R. McClure, *supra* note 71, at 120-21.

For a general discussion of advocacy advertising's ability to convey information, see P. Sethi, *supra* note 129, at 237.

131. "But the fact remains that when faced with a political message many viewers or voters will opt out, by changing the channel. The reality of this finding means that short ads that capture audiences built by entertainment rather than political interest are and will remain essential ingredients of political communication." Broadcast Media in Elections, *supra* note 77, at 86, 88 (testimony and statement of Dr. Christopher Arterton).

132. *Id.*

133. See *supra* note 130.

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best meets the twin goals of expanding political information and providing diverse voices and views.

Network administrative arguments against a reasonable access plan are likely to come in two forms: that such a proposal will cost them money; and that this amount of access, coupled with candidate access, turns them into common carriers, a result the Communications Act of 1934 specifically prohibits.¹³⁴ The answer to the former criticism is that it is a speculative harm, at best. Licensees could increase marginally their commercial ad rates so as to eliminate any loss caused by the small decrease in ad spots available for commercial sponsors. Moreover, the overall cost of this proposal should still be considerably less than the response time they were required to provide under the Fairness Doctrine. Similarly, monitoring and scheduling requirements should be simpler under the proposed first-come, first-served statutory plan because they do not require the station to provide paid or unpaid contrasting views in the same or equivalent time periods.¹³⁵

The candidate access requirements make it clear that licensees can be required to provide some access; the unanswered question is just how much can be required before broadcasters are transformed into common carriers. The proposed statute mandates just over one hour per week of access, less than 1% of the hours in a broadcast week. This minimal requirement should not push licensees over the line into common carriage. If, however, while the candidate access requirements are in effect, Congress finds that the obligation is too burdensome for broadcasters, the reasonable access requirements for editorial ads could be lifted during the 45 days before a primary and the 60 days before a general election when the candidate access requirements are in effect. Congress, of course, also has the option of amending the common carrier provision or of simply redefining the grant to licensees as the right to broadcast

134. "[A] person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." 47 U.S.C. § 153(h) (1983).

135. For a period prior to 1987, advocacy advertising on ABC-owned radio and television stations was permitted during the afternoon movie period, after midnight, and between 7:30 and 8 p.m. A look at the guidelines for acceptance of such advertising indicates the practice was much like that recommended in the proposed statute. ABC checked for personal attacks, defamatory statements, and candidate endorsements, none of which was permitted. ABC also required that these ads be approved by the Broadcast Standards and Practices Department and the General Manager of the Station, a more comprehensive review than that required under the regime proposed here. American Broadcasting Co., *Advocacy Advertising Guidelines*, ABC-Owned Radio and Television Stations 1 (Apr. 1, 1986).

only 166 hours and 57 minutes per week instead of the 168 hours currently allocated.

Finally, this proposal may be faulted for not completely meeting what Alexander Meiklejohn identified as an essential first amendment goal, averred in *CBS v. DNC*, "not that everyone shall speak, but that everything worth saying shall be said."¹³⁶ While it is true that the proposed system of access cannot *guarantee* that all information necessary to self-government is conveyed, it certainly would increase the odds.

Conclusion

More than 60 years ago, when Congress first intervened to bring order to the electromagnetic spectrum, it decided to allocate much of the spectrum space to radio broadcasting rather than to other claimants because of the important contribution broadcasting could make to an informed electorate.¹³⁷ Until Congress finds that developing audio and visual technologies have replaced broadcast in performing this function, it cannot abrogate its regulatory role. When the Supreme Court decided *CBS v. DNC* 15 years ago, a requirement that broadcasters accept editorial advertisements, in addition to covering public issues and presenting contrasting views at their own expense, may have seemed too much to ask. But absent the Fairness Doctrine, an editorial access requirement is less a burden than an appropriate means of balancing the public's right to be informed against the broadcasters' right to speak.

When the Fairness Doctrine was in operation—and being enforced—broadcasters often handled political issues by featuring "objective" newspeople explaining the controversy and its significance. That approach may represent good journalism,¹³⁸ but it cannot make the same contribution to public discourse that the advocacy of a Thomas Paine, or his modern day broadcast equivalent, can. Viewer access to the impassioned argument of the adherent seems all the more valuable in a period when political cynicism is high and participation is low. Even if Congress should succeed in resurrecting the Fairness Doctrine, an issue advertising

136. A. Meiklejohn, *Political Freedom* 26 (1948), cited in *CBS v. DNC*, 412 U.S. at 122.

137. H. Geller, *The Fairness Doctrine in Broadcasting: Problems and Suggested Courses of Action* 2 (1973).

138. For a discussion of ways in which the press can improve its coverage of government, see L. Wolfson, *The Untapped Power of the Press: Explaining Government to the People* (1985).

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access statute would serve as an important complement because editorial advertising can enrich the public debate in a unique and important way.

Cultural, educational, and entertainment programming will always compete with political programming for broadcasters' and viewers' attention. Moreover, lengthy public affairs programs are unlikely to capture the very viewers who—for economic and educational reasons—rely on television for their political information. By presenting political issues in manageable time segments, argued by those with strong preferences for particular outcomes, a plan for editorial access can circumvent broadcasters' tendency to avoid controversy and some audiences' tendency to avoid political broadcasts. The certain result will be a better-informed citizenry and a broader public debate.